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THE FICTIONS OF THE LAW: HAVE THEY PROVED USEFUL OR DETRIMENTAL TO ITS GROWTH?[1]

I.

THE literature of legal fictions[2] has one curious peculiarity. While upon other legal subjects the opinions are in general as various as the individual writers, and are, at least in seeming, put forward not with conviction, upon this topic it would appear there are but two opinions, diametrically opposed, and each supported with the greatest warmth. These two opinions are, apparently, that fictions are an unmitigated evil, a scandal and disgrace, and that they are one of the chief glories of the common law.

[1] This essay received the prize offered by the Harvard Law School Association to the graduating class of 1893. — EDITORS.

[2] The subject of this paper possessing, as it does, an interest rather curious than practical, it has seemed possible and desirable on that account to relieve the reader to some extent from the usual tyranny of foot-notes by collecting at once the general references: —

Adams on Eject. c. 1; Bentham (ed. Bowring): Frag. on Gov't, 235 n., 243; 5 Works, 13, 92, 234, 510; Best on Ev. 313; Best on Presump. c. 2; 3 Blk. Com. 43, 107; Challis Real Prop. c. 18; 2 Cruise on Fines, 1, 258; De Lolme on Const. Eng. 104–7; Ferguson's Moral Phil. pt. 5, c. 10, § 3; Digby, Hist. Real Prop. c. 5, § 2; Maine, Anc. Law, c. 2; Rawle, Cov. for Title, 1–10; 1 Reeves Hist. Eng. Law (ed. Finlason), 73–6; Wms. on Real Prop. c. 2, pp. 62, 76, 237; Wright on Tenures, 2, 156; 2 Cent. L. J. 582; 15 Ir. L. Times, 612; 1 Jur. Soc. Papers, 360; 2 Legal Rep. 222; 9 Monthly L. Mag. 172; 9 N. J. Law Journal, 360; 2 Quar. L. Journal, 305.

Bentham was particularly severe in his denunciation of fictions. Perhaps he was a little less intemperate than usual when he said, "Fictions are falsehoods, and the judge who invents a fiction ought to be sent to jail." Later he adds: —

"'Swearing,' says one of the characters in a French drama, 'constitutes the ground-work of English conversation.' Lying, he might have said, without any such hyperbola, — lying and nonsense compose the ground-work of English judicature. In Rome-bred law in general, — in the Scotch edition of it in particular, — fiction is a wart which here and there deforms the face of justice. In English law, fiction is a syphilis which runs in every vein, and carries into every part of the system the principle of rottenness."

In the "*Examen Legum Angliae;* or, The Laws of England examined by Scripture, Antiquity, and Reason,"[1] the author, whose name does not appear upon the title-page, says "that all manner of pleadings and proceedings, both in law and equity, are stuffed with falsehood and lies."

There is no uncertainty about the views entertained by these two learned writers, and there are a great many degrees separating the point of view from which they look and that of the writer of the following extract from an article in the "Monthly Law Magazine:"[2] "To us . . . it is always a matter of extreme delight and refreshment to turn to those exquisite fictions which both adorn and simplify our law; mingling utility with sweetness, and tending to the noblest end to which poetry can devote itself, namely, to benefit mankind and render them happy."

It must be admitted that some of the fictions met with in daily practice up to within very recent times were calculated to awaken astonishment in any mind unhackneyed by perfect familiarity. To find that in order to sue in an English court upon a contract actually made at sea it was a necessary averment that the contract was made at the Royal Exchange; and in an action to try the title to land, to find set forth a wholly fictitious lease and entry, the lessee being a fictitious personage, and a subsequent ouster by a non-existent ejector, — might well seem to require strong affirmative justification. The amusing writ of *Quo minus*, by which the Court of Exchequer gained jurisdiction in certain cases, which proceeded upon the allegation that the plaintiff was debtor to the

[1] London, 1656.

[2] 9 Monthly Law Mag. 172.

Crown and unable to account through the defendant's default; the equally curious *Latitat*, setting forth that the defendant had committed a trespass and was in the custody of the marshal of the Queen's Bench, by which that court obtained a certain jurisdiction; the losing and finding in the action of trover; the proceedings in conveyances by fine and common recovery, — these and many others might well appear open to more than mere criticism.

Viewing these fictions in this fragmentary and dislocated form; taking them as they stand, disconnected from their surroundings, from the times and needs which gave them being, — there is at least a *prima facie* case, it would seem, for those who attack them.

But is such a detailed view allowable? Taken separately, these various false averments and denials, collusive suits, presumptions and relations, may appear not merely absurd, but positively unjust and wrongful. Looked at in their proper relations; noting their cause and effect; the people among whom and the conditions under which they flourished, — the absurdity and injustice may perhaps disappear.

It will be the object of this article to gather up a few of these old bits of the bony framework of the law, to assemble them in their proper relations one to another, and, for the occasion, to attempt what may be called a restoration.

The law of to-day is the law of yesterday modified and expanded by the needs of the new day. It is to this capacity for modification, this prompt effort to meet the constantly arising needs of society, that English-speaking people owe much of their liberty and happiness. A community whose legal system is slow to respond to the wants of those for whose government it is instituted must of necessity be cramped and retarded in its development. It seems evident that this adaptability and ready response to the wants of the people is one of the greatest excellencies that any system of law can possess.

What are the means by which the law is modified and expanded; that is, what are the means by which the law is changed?

Roughly speaking, the means of change are two, —

1. Acts of Legislative Power.
2. Acts of Judicial Power.
   (*a*) Judicial Decisions.
   (*b*) Judicial Fictions.

It will be observed that judicial fictions have been classed as a form of judicial power. The classification is the conventional one,

and though convenient enough, it may be observed at the outset that it is not exact. Judicial fictions are, in truth, but the handmaidens of the only true judicial power, — that of decision. For the present, however, they will be dealt with in the generally accepted fashion, as the product of a power distinct from that of decision.

Under any form of civilized government the common people are the real generators of law. Their influence may be slow in asserting itself; the popular feeling may take long to crystallize into a definite want; but the want, once existing, presses continually for recognition. It may be stifled for a time, but sooner or later the demand must be met and satisfied. In the satisfaction of these popular needs, legal fiction has been a favorite instrument. While it cannot be said that it has always been the best *possible* means to attain the desired end, it can with truth be said that it has usually been the best *available* means. The apathy of those whose interests were not immediately affected; the lack of any union among the people to enforce directly the satisfaction of their desires; the combination and active opposition of those whose interests might be unfavorably affected by any change in the existing law; together with the fact that those opposed to the will of the people frequently controlled the machinery of direct legislation, — these reasons excused and perhaps justified a resort to indirection. The judges, who were in many ways close to the people, able to understand their wants, and in a position to give voice and form to them, could and did do it.

Looking at the matter in a large way, therefore, it may be said that legal fictions obtain what vitality they have originally from the people; for although not directly created by them, they are invented to meet an assumed want, and the fact that they flourish is itself an evidence that the want did exist and is in some sort met.

Mr. Best, in his books upon Evidence and upon Presumptions, defines a fiction as "a rule of law which assumes as true, and will not allow to be disproved, something which is false, but not impossible." Other legal writers give definitions not substantially different.

While this definition may be a good one as a matter of theory, as a practical matter it is too narrow to include various devices which are commonly regarded as fictions, and which are as fictitious in their character, and as truly fictions, although of a different kind, as those which fall under the definition of Mr. Best. A definition

which should be made wide enough to include these various other devices would, upon the other hand, be as much too wide practically as Mr. Best's definition is too narrow, for the line has been drawn at no natural point of cleavage, but arbitrarily. The definition here suggested must be taken with this in mind: A legal fiction is a device for attaining a desired legal consequence, or avoiding an undesired legal consequence. Of these devices there are three principal sorts: —

1st. The use of one or more of the existing laws in a way unforeseen and unintended at the outset.

2d. The assertion that certain facts do or do not exist, contrary to the truth of the matter.

3d. Fictions of relation.

Of the first class an obvious example exists in the conveyance by lease and release. The Statute of Uses (27 Hen. VIII. c. 10), whose *object* was the destruction of uses, enacted that henceforth a *cestui que use* should be seised of the same estate he had in the use. Conveyancers soon took advantage of this enactment, and proceeded to create equitable estates for a short term in a proposed grantee, which the statute as promptly transferred into an estate in possession. Being thus theoretically in possession, the *cestui* was enabled to take a common law release of the reversion of the grantor, and the fee was thus transferred without the necessity of actual entry, as was required before the statute.

Another neat example under the first class is afforded by the Roman law. In the Roman law the power of a father over his children was absolute, he might kill them or sell them for slaves; and such was its permanence that if a son, after having been sold by his father, was emancipated by his master, he fell again into the power of his father, which was suspended but not destroyed by the sale. In the early times of the Republic there was no way in which a young man could become free but by the death of his father, who could not release him by any act he could do. It was afterwards enacted by a law of the Twelve Tables that if a son was sold by his father three times, and was three times emancipated by his master, he should become free. A legal fiction sprang up. The natural desire of a father to benefit his son existed, and at first the law afforded no means to gratify it. At last a law whose *object* was to check the authority of unnatural parents is passed, and it is immediately, by collusive and fictitious sales,

made the means of effectuating the desire, though not within its purview at all.[1]

The second class comprises a very large number of fictions which, while possessing little importance as affecting the actual development of the law, have, from their bald falsity, attained to a distinction beyond their desert. While their object was usually to effect some reform in procedure, as in the action of ejectment; to extend the jurisdiction of the courts to matters not theoretically cognizable, as in the writ of *Latitat* or *Quo minus;* or to provide a place in the old classification for a new right, as in the fictitious promise in actions upon the common counts, — they were seized upon by those who did not understand their significance as affording a good point of attack. Such fictions have usually the great demerit of contradicting upon their face the common knowledge of mankind, while the ends for which they are invented are not of such an important nature as to make it quite clear in every case that the end justifies the means. Upon the other hand, it may be said of these devices that, saving the discredit which their apparent falsity brings upon the law, they are usually harmless and effective instruments.

The fictitious promise mentioned above is worthy of a few special words. It is one in a class to which may be assigned most of the fictions of relation. As the law develops and the process of refinement goes on, new rights are conferred and new classifications become necessary. There is no place in the old law for the new idea. Perhaps the plain way to confer the new rights would have been to say that certain acts should be followed by certain consequences, enumerating the acts at length, and the consequences also. There were certain difficulties in such a method, and the development of the common law in other ways suggested and made easy the short cut which was actually taken. Where upon the happening of an event a certain legal effect was desired, the occurrence of another event from which the consequence wished for would follow was feigned. For example, to classify a thing as a contract indicates at once certain legal consequences. Where upon certain transactions it is desirable that the parties should have to some extent rights and liabilities as upon a contract, although there was no mutual intention to contract, the end is reached promptly by saying that a contract is presumed, and permitting the promise to

[1] 2 Quar. L. J 312.

be stated. The law of agency is full of these bits of legal terminology. A curious instance of the application of this principle is to be found in a common statute. The common law has defined the meaning of the word *perjury*, and to anything coming within the definition certain legal consequences are attached. When it became necessary to make those who falsely affirmed punishable, instead of creating a new offence and defining its punishment it was found more sure and easy to refer it to the already existing class, with its well-developed law, and so it is generally enacted "that every person falsely making a solemn affirmation *shall be deemed* to have committed perjury."

Fictions of relation, the third class in the classification attempted, have made themselves a part of the law. The discussion is not open as to their general utility, or whether they have justified their being, or outlived their usefulness. The doctrine of relation has become a part of the legal instinct of every common lawyer. It pervades every branch of the law, and to destroy it would necessitate the recasting of the entire body.

Fictions of relation have been divided into four kinds:[1] —

1st. Where the act of one person is taken to be the act of another.

Example: The act or possession of the servant equivalent to the act or possession of the master; felonious act done by one person in the presence of others, aiding and abetting him, the act of all.

2d. Where an act done by or to one thing is taken by relation, as done by or to another.

Example: Possession of land transferred by livery of seisin, or a mortgage of land created by delivery of the title-deeds.

3d. Relations of place.

Example: Contract made at sea, by a fiction of relation held to be at the Royal Exchange.

4th. Fictions as to time.

Example: Feoffment, with livery of seisin: subsequent attornment relates back. Title of the administrator relates back to the death of the intestate. Ratification by a principal of a previous act of his agent makes it good by relation.

Perhaps the part that the fictitious principle has played in the development of the common law, the invaluable assistance rendered in overcoming its rigidity at certain periods, in evading bad

[1] Best, Evidence, 313.

laws, amending defective ones, and rendering it possible to make law when it was necessary, cannot be better shown than by a slight sketch of some one branch; and for this purpose of concrete illustration some of the different stages in the development of the law of real property have been selected.

II.

The original grant by the feudal lords to their retainers, after the Conquest, seems to have been for life only, and was unalienable without the consent of the lord. From a very natural desire upon one side, and probably from lack of objection upon the other, these estates were soon changed into estates descendible to the lineal heirs male of the first donee. From this first breach in the feudal system, which came about by mutual consent, as it were, it is desired to note the successive means by which further concessions were gradually obtained for the tenant class, until the long battle between the nobles upon the one hand, and the judges, formulating the wants of the people, upon the other, ended in that complete dominion which every owner of land to-day exercises as of course.

The descent of the land to the lineal heirs of the tenant having grown into a recognized right, the first step taken by the courts was to extend it to collateral heirs by a *presumption* that all who could claim collaterally were of the blood of the first donee. This assumption of certain facts for true, without regard to the real truth of the matter, had the effect of legislating the lord's reversionary interest practically out of existence. The right of the heirs general of the tenant to the lands after his death having in this manner been acquired, the right to alienate in the life of the vassal was next sought; and while it was held to be impossible for a feudatory to alienate his feud, a *distinction* was soon taken between alienating the *tenure* itself and alienating the *lands*.

By these "presumptions" and "distinctions," the tenant found himself in possession of the principal of those rights which are to-day inseparable from ownership of land, — the right to transmit it to his heirs, lineal and collateral; and the right, to a certain extent, of alienating it in his lifetime.

The means adopted by the lords to combat the extension by the courts of the rights of the tenants was the invention of the estate afterwards known as a *conditional fee*. This was a grant,

not to A and his heirs generally, but to A and some particular class of heirs; as, for example, to A and his heirs by his wife X. The judges, pursuing their policy, proceeded to *construe* these gifts in a very liberal manner; they had recourse to an ingenious device taken from the nature of a condition. It is a maxim of the common law that when a condition is once performed, it is entirely gone, and the thing to which it is annexed becomes absolute. Upon the construction of the grant as a grant upon condition, they decided that as soon as issue was born answering the requirement of the grant, the estate of the grantee was absolute.

The construction put by the judges upon these grants made by the lords, as gifts upon condition, directly contravened the purposes for which they were created; and the barons soon made a more successful attempt to carry out their policy, in a manner which shows clearly their power over the machinery of direct legislation, and the impossibility of attempting through that means to meet the wants of the growing society. In 1285 the celebrated Statute *De Donis*[1] was passed, which provided that upon such a gift the donee should "have no power to aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert to the giver and his heirs if issue fail."

This destroyed all power of alienation of lands granted in such a way, and cut down the fee to narrow limits. The evils of such an enactment are obvious. Redress through the parliament of barons was impossible. It is common history that in every successive parliament, from Edward I. to Edward IV., a period of nearly two hundred years, bills were introduced to repeal the statute, and invariably rejected. The courts had recourse to various shifts, at first to mitigate the evil effects of the statute, and finally to neutralize its objectionable features.

The application of the doctrines of warranty and collateral warranty were the first steps taken. At common law the warranty of any ancestor bound the heir to render equally valuable lands to a grantee of the ancestor, *even without lands descending*.[2] A statute,[3] nine years before the Statute *De Donis*, had changed

[1] 13 Ed. I. c. 1.

[2] It should be observed that the so-called sales of those days were in most cases merely perpetual leases by the grantor and his heirs to the grantee and his heirs. As the rent or services reserved came to the heir, the injustice of holding him bound without lands descending from the warranting ancestor was therefore more apparent than real.

[3] 4 Ed. I. c. 6 (1276).

this by providing that where no tenure was created by a gift (and consequently no services as incident could be reserved), the warranty did not bind the heir. The judges took it that the Statute *De Donis* had not affected the law of warranty, and held, therefore, that the heir in tail was bound by a warranty of the tenant in tail as far as he took other lands to answer. This, of course, was only a slight relief, for this lineal warranty was not effective unless the tenant in tail died seised of an estate in fee. The statute mentioned above,[1] requiring the descent of assets to bind an heir, had reference only to lineal warranties, probably because no trouble had been experienced from the warranting of collateral ancestors. The judges, therefore, assumed that other warranties remained as before, that is, that the descent of assets was not essential to bind the heir; therefore by getting a collateral ancestor, whose heir the issue in tail would be, to concur in the alienation of the entailed estate, the Statute *De Donis* was successfully evaded.

Whether such a rule be regarded as just or not, as applied to the barring of estates in fee tail, depends upon the point of view from which the matter is regarded.[2] From that of the barons or of the heir in tail, it might be considered hard. From every other point of view it seems everything that could be desired. The effect of the application of this doctrine of collateral warranty upon the heir, in those cases where the relationships rendered it possible, was, that he was placed in exactly the same position he was in before the statute and is in to-day. The doctrine of collateral warranty is a fine example of the use by the judges of a practically obsolete bit of law for a purpose altogether different from its original one. The doctrine itself would doubtless have been specifically included in the statute of 4 Edward I. if it had been practically injurious enough to make it worth while. Though grossly unjust, it escaped, for this reason, to serve the judges later as an instrument for effecting a very useful and necessary end.

After the Statute of *Quia Emptores* (1290), which gave tenants in fee a general license to aliene, the alienee to hold of the original grantor and not of the tenant, the only restraint left on alienation by a tenant in fee was the necessity of the happening of the condition precedent, — the birth of the heir. In the time of Edward II. the judges in a case[3] laid down a rule which removed this last

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[1] 4 Ed. I. c. 6.

[2] See Russ *v.* Alpaugh, 118 Mass 372.

[3] Y. B. 18 Ed. II., fol. 577.

vestige of restraint. They held that "when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited to his heirs in fee or in tail, in such case 'the heirs' are words of limitation, and not words of purchase." This is the rule now known as the rule in Shelley's Case.[1]

The introduction of uses (about 1370), by ecclesiastics, with the object of avoiding the statutes of mortmain, was turned to account by the courts in conferring indirectly the power of alienation by will, lost at the time of the Conquest. The courts recognized the distinction between the *legal seisin* and the beneficial *use* as they formerly had between the *tenure* and the *land*. A tenant in fee by a conveyance in his lifetime to such uses as he should appoint by his will was given this great additional power.

To return to the Statute *De Donis* and its effect upon conditional fees. Its immediate effect was to make the land so given inalienable. The application of the doctrines of warranty and collateral warranty, where the relationships made it possible, gave some slight relief; and here matters rested for almost two centuries. The barons in parliament absolutely refused to repeal the statute; and but for the boldness of the judicial legislators, operating by way of a fiction, it is impossible to say how long the system of perpetual entails created by the statute might have continued, or what the final outcome might have been.

The fiction of the common recovery, to which Taltarum's Case gave the first judicial sanction, and which was in effect a judicial repeal of the principal enactment of the Statute *De Donis*, depends entirely upon a bold application of the doctrine of warranty. A common recovery is a judgment obtained in a collusive suit brought against the tenant of the freehold in consequence of a default made by a person vouched to warranty in such suit. The fiction consisted in this, that the person vouched to warranty was a man of straw (usually the crier of the court), who suffered judgment to go against him. The plaintiff recovered the lands of the defendant, who in turn had a judgment against the man of straw, that he render him lands of equal value. The demandant recovered an estate in fee simple which could be disposed of as might have been arranged.

"Such a piece of solemn juggling could not long have held its

[1] See 1 Harg. Law Tracts, 500.

ground, had it not been supported by its substantial benefit to the community; but as it was, the progress of events tended only to make that certain which at first was questionable." [1] The right to suffer a common recovery was soon considered as the inseparable incident of an estate tail, and every attempt to restrain this right was held void.[2]

It was by the aid of this fiction that during four hundred years the common law succeeded in rendering abortive every attempt that the ingenuity and interest of landowners could suggest to erect a system of perpetual entails, until at length the principle embodied in Taltarum's Case was fixed by an Act of Parliament. It is more than probable that this long delay in providing for the want by direct legislation was due to the effectiveness of the substitute; and this is perhaps one of the arguments that may fairly be urged against the use of such a fiction: that by supplying the need in one way it removes the pressure which would (it may be) compel the satisfaction of that need in another and perhaps better way.

III.

This slight account of the rise and progress of the right to that absolute dominion over land which is possessed to-day by every owner shows that the most important forward steps were achieved by the courts alone, and at a time when the object could not have been attained at all, had it been necessary to depend upon the legislative department.

The process by which the courts legislated the lands into the hands of the people, as we have seen, had several stages. After the right of lineal heirs to succeed their ancestor had been conceded, the first step taken was the *presumption* by which the inheritance was extended to collateral heirs, then the *distinction* between the tenure itself and the land, by which the law forbidding alienation without the consent of the lord was evaded; following this the curious *construction* put upon the so-called conditional fees which practically nullified the first attempt of the lords to return to first principles, while the doctrine of *collateral warranty* and the fictitious *common recovery* neutralized the second attempt. The application of the *distinction* between the legal seisin and the use of land, and the allowance of a devise of the latter, conferred the last essential power needed to give complete control.

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[1] Wms. R. P. 45.

[2] Mary Portington's Case, 10 Rep. 36.

Of these means employed, probably only the last in point of time, the common recovery, would be admitted upon all hands to be a fiction at all. Many, perhaps, would consider a *presumption* — which is an assumption of the truth of a certain matter without regard to the actual fact — as having every element that goes to make up a fiction of a certain kind. The ordinary definitions would, however, exclude all the other steps in the process; and yet the finely drawn distinctions, the strained constructions, and the arbitrary application of inapplicable rules of law, when such an application would produce a desired result, — all this sort of thing seems to be based upon the same principle which underlies the more obvious fictions.

What is this principle? The definition of a legal fiction, already put forward, as "a device for attaining a desired legal consequence, or avoiding an undesired legal consequence," besides the defect of vagueness peculiar to itself, has another which it possesses in common with other definitions. This other defect is its failure to note in any way the fact that fictions are not a genus of which the various kinds are species, but that the fictions themselves are but a species of a much larger class of legal devices, which have been rendered necessary by the *unacknowledged* character of the power of legislation exercised by the judges, which, as a necessary consequence, entailed a resort to this principle of fiction.[1] The principle might be exemplified in reasons unconsciously or consciously false, or at the other extreme by the statement of facts knowingly false; but the object in either case was the same, — to harmonize the new decision with the old law.

It may be said that decisions might and may be given without assigning reasons. If this were ever done, and the last judgment was in effect new law, it would be simply the doing openly what

[1] Upon this point Sir Henry Maine says, in his book on Ancient Law, p. 31, "The process by which this virtual legislation is effected is not so much insensible as unacknowledged. With respect to that great portion of our legal system which is enshrined in cases and recorded in law reports, we habitually employ a double language. . . . The judge assumes that no question is or can be raised which will call for the application of any principles but old ones . . . such as have long since been allowed; . . . yet the moment the judgment has been rendered and reported, we slide unconsciously or unavoidably into a new language. . . . We now admit that the decision *has* modified the law; the rules applicable . . . have been changed. . . . We do not admit that our tribunals legislate; we imply that they have never legislated; and yet we maintain that the rules of the English common law, with some assistance from the Court of Chancery and from Parliament, are co-extensive with the complicated interests of modern society."

has always been done. The practice of assigning reasons simply compels the taking of short steps, or that the power exercised shall be conscious legislation; for no line of argument could pass far out of the straight way without the consciousness of the reasoner. To illustrate this, suppose a decision to be made which is exactly warranted by the existing law. This may be supported by reasons absolutely sound; reasons which may be projected indefinitely without varying a hair's breadth from the true line of the existing law. But suppose the decision, however slightly, to change the existing law. The change may be conscious or unconscious; but if there is a change, no reasons could be by possibility assigned for it which would not, if pushed far, show the deviation.

What seems to the writer to be the true definition of a legal fiction is this: —

A legal fiction is a device which attempts to conceal the fact that a judicial decision is not in harmony with the existing law. The only use and purpose, upon the last analysis, of any legal fiction is to nominally conceal this fact that the law has undergone a change at the hands of the judges.

Just where the line of definition should be drawn across this line of devices, upon one side of which they should be called *fictions*, is not important. Had usage confined the meaning of the word to such of these devices as fall under class 2, in which certain facts are alleged or denied, which, *if true*, would make the decision based upon them consistent with the old law, it would have been a logical division. Having gone beyond this, it is difficult to say just where the next stop should be made. The application of the Statute of Uses in the conveyance by lease and release, or the use made of the Roman law as to the sale of sons by their fathers, although unexpected consequences, were within the terms of the law. The doctrine of Collateral Warranty as used after the Statute *De Donis* was also but the application of existing law; and the latter, it would seem, is fictitious in the sense that the two former are. Both may be described as negative fictions, for the judges regularly in the exercise of their powers find no difficulty in going *contra* to the letter of a statute to give effect to its spirit, or refusing altogether to apply an inapplicable rule; and when they neglect to exercise this power in order to reach some desired result, they in effect adopt what is in spirit illegal. The power exercised in the case of some *distinctions* is a conscious furnishing of words to justify a

judicial decree. In the case of the distinction as to tenure, while it nominally left the tenancy subsisting, it was practically eviscerated. As between the original lords and tenants and the courts, it was an evasion; the avoidance of an obstacle by a figure of speech.

Considering legal fictions in this broad way, the question which forms the subject of this paper is answered at the outset. These things, it is clear, are as much a part of the law as the decisions of the courts or the enactments of the legislative body. Without such things the course of legal progress would have been blocked at every step.

The result of the matter may be summed up in few words: Those whose duty it was to administer and expound the existing law, having in theory no power to abrogate or alter it, have, when justice demanded it, avoided an undesirable result, or reached a desirable one, in spite of, or without assistance from, the existing law, and have given many reasons in the process to show that what they did was still in line, until presently the new departure received the ratification of general assent, and became in its turn a rule. They have gone farther still, and by divers subtle imaginings, distinctions, and constructions, have moulded the law yet more openly. When evidence failed, a presumption supplied its place; when a technical rule was found inapplicable to special circumstances, it was held so; when the end in view required it, the technicality could be regarded as compulsive; plaintiffs might, by sufferance of the courts, state palpable untruths, and defendants might not deny them; and from that fine line where a decision departing but little from the established law is made and supported by reasons which aim to show that there is no departure at all, through all the various gradations to the coarsest and most palpable fiction, the underlying principle and object is the same, — to conceal, at least nominally, the fact that the new decision is not in accord with the existing law.

It cannot be doubted that those manifestations of the fictitious principle of a more refined and therefore less obvious character which generally accompany an act of judicial legislation have been of vital service to the law in two ways: first, by making less noticeable both to the world and to the judges themselves (and therefore more easy) the legislation that is being accomplished; and secondly, by serving as a brake upon this indirect law-making power: for the reasons assigned must not, under ordinary circumstances, be too plainly bad. It may be doubted whether the coarser

manifestations of the fictitious principle — the common fictions — have upon a balance of profit and loss shown a margin upon the right side. It can reasonably be said that the mere inconveniences generally avoided by their use might well have been endured until the legislative branch in its dignified progress provided a remedy. The law would thus have been spared some confusion and much not really merited abuse. But even if the use of fictions, using that word in its narrower sense, has proved detrimental to the development of the law, which does not appear, we cannot forget that they are the product and a part of a principle which has been essential to that development. If they are regarded as an abuse, still we cannot fairly debit them with the evil they have done without regarding the good which has flowed from that of which they are a necessary consequence; for some excess must be regarded as a necessary consequence of any great power.

It is certain that every one of these coarse fictions had some object, and the fact that it continued in use is proof that this object was at least partially attained. It is undeniable that certain of them proved of enormous service. Whether in any particular instance the net result of gain was sufficient to justify the introduction into the law of another anomalous thing might be a question; but to the writer, at any rate, it seems clear that the common law is much indebted to fictions, considered as a whole, for its rapid development and ability to follow closely the wants of men. Apart from the objection, upon moral grounds, that fictions are falsehoods, there have been but two other objections suggested which are entitled to consideration; and unless these appear to the reader so conclusive as to quite overbear the various suggestions which have heretofore been put forward, it would seem that the result should be a judgment for the fictions.

The objection most commonly urged against the use of legal fictions is that they usurp the legislative power. Admitting that the charge is true, one may well ask, What of it? Had the English people at various periods of their national life, and indeed through all periods, been obliged to depend entirely upon the formally authorized source of legislation, not England alone, but the world at large, would have been losers.

The second objection is well stated by Sir Henry Maine in his chapter upon Legal Fictions.[1] He says: —

[1] Anc. Law, 27.

"It is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction. [And he adds:] I cannot admit any anomaly to be innocent which makes the law either more difficult to understand or harder to arrange in harmonious order. . . . Legal fictions are the greatest of obstacles to symmetrical classification. The rule of law remains sticking in the system, but it is a mere shell. . . . Should [it] be classed in its true or in its apparent place?"

To the writer it appears that both of these objections are in a way to lose what force they originally possessed. They are based upon the ordinary narrow view of the object and cause of fictions, and apply only, therefore, to the coarse fiction of the common definition. The cruder manifestations of the fictitious principle die first. They have already almost ceased, in competition with the legislature, to make good their place. The direct way is now the short way; and these objections will therefore soon be directed to something which has ceased to exist. The real objection, it would seem, should be to the power of judicial legislation itself. The fictitious principle — which includes all manifestations — is incident to that. Such an objection, in the light of history, would be, of course, absurd.

While the power of judicial legislation exists and is exercised, though unacknowledged, its exercise must be, at least nominally, concealed. The last vestige of the fictitious principle will die out when the need to resort to it has ceased. When in the fulness of time the law has achieved its full stature; when every great principle has been not merely dotted out, but firmly outlined; when what is apparently conflicting has been harmonized, and what is left to do is but a process of amplification and refining, — fictions and the fictitious principle itself will cease to be used, because they will have ceased to be useful.

Oliver R. Mitchell.